U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **January 24, 2001**

Case No.: **2000-INA-185**
CO No.: **P1999-MD-03317983**

In the Matter of:

DR. & MRS. ZAKARIA OWEISS
Employer,

on behalf of:

ARIZA EL KHATROUF
Alien.

Appearance: Malea Kiblan, Esquire
for Employer and Alien

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification[1] filed by Dr. & Mrs. Zakaria Oweiss ("Employer") on behalf of Ariza El Khatrouf ("the Alien") for the position of Domestic Cook. The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. § 656.27(c).

[1]Alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. Unless otherwise stated, all references are to 20 C.F.R.

STATEMENT OF THE CASE

On January 13, 1998, Employer filed an application for alien employment certification on behald of the Alien to fill the position of Domestic Cook. The job to be performed was described as follows:

> Prepare and serve all family meals. Assist in preparation of menus, food shopping requirements, assist in food shopping. Able to cook all forms of Arabic Cuisine. Able to prepare foods and appetizers for large dinner parties or other entertaining. Clean kitchen, cooking utensils and dishes. Prepare special diets as needed.

(AF 64-66). Hours of employment were listed as 40 hours per week, with overtime "as needed." A live-in and split shift requirement of 7:30 to 10:00 a.m. and 3:00 p.m. to 8:30 p.m. was specified, as well as a special requirement of non-smoking. Minimum requirements for the position were listed as a High School diploma and two years experience in the job offered. *Id*. Employer received no applicant referrals in response to its recruitment efforts. (AF 63).

A Notice of Findings ("NOF") was issued by the CO on August 12, 1999, citing § 656.20(c)(8) and questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 58-61). The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled workers" category. Because the occupation of Domestic Cook requires two years of experience, it is considered a skilled position. Employer was instructed to explain why the position should be considered a *bona fide* opportunity for a Domestic Cook as opposed to one created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate. In addition, the CO cited § 656.21(b)(2)(i) in concluding that Employer's requirement that the worker live on Employer's premises is unduly restrictive unless supported by evidence of business necessity. (AF 61).

In Rebuttal, Employer responded to each of the twelve questions. (AF 10-57). Employer stated that they have employed a household cook since the mid-1980's and identified a person they sponsored for labor certification who had worked performing cooking, light housekeeping and childcare duties until 1994. Because their two children were now high school and college aged, Employer stated that childcare is no longer required. Employer stated that the Alien would be employer to prepare and serve breakfast between 7 and 7:30 a.m., help plan menus and sometimes accompany Employer to do the grocery shopping, clean the kitchen and then be free from 10:00 a.m. to 3:00 p.m. The Alien's services would then be required from 3:00 to 8:30 to prepare an afternoon snack for their high schooler, sometimes prepare tea for family members or clients, and to prepare,

serve and clean-up the evening meal. Employer stated that Dr. Oweiss provides medical care for international patients and that his marketing and hiring efforts require frequent houseguests, dinners, receptions and teas. Mrs. Oweiss is employed full-time as a real estate agent. Employer documented their houseguest and entertainment schedules for the years 1997 and 1998, evidencing dinner guests at least twice a month and houseguests nearly every month - some which stay for several weeks. Employer stated that their entertainment needs have substantially increased since Dr. Oweiss opened his new clinic. With respect to the live-in requirement, Employer stated that this was imposed because Employer does not live close to public transportation and that requiring a cook to have his or her own transportation is even more onerous than a live-in requirement.

A Final Determination denying labor certification was issued by the CO on November 18, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide* position for a Domestic Cook in their household, and that Employer had failed to establish that the live-in requirement arises from business necessity. (AF 7-9). Noting that most family members will be outside the home for a greater part of the Alien's work schedule and that Employer failed to indicate who does the housework in the household, the CO concluded "the evidence shows that it is more likely that the alien will be employed as a General Houseworker than a Domestic Cook." The CO similarly rejected Employer's stated basis for the live-in requirement, noting that there are many alternatives to public transportation that do not involve living on the Employer's premises.

Employer filed a Request for Review on December 13, 1999. (AF 1-6). The matter was docketed in this Office on March 7, 2000. Employer filed a Statement of Position brief on April 21, 2000.

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be *bona fide*, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers. The burden of proof for obtaining labor certification is on the employer who seeks an alien's entry for permanent employment. § 656.2(b).

In denying labor certification, the CO concluded that the details provided did not establish that there was a *bona fide* position for a Domestic Cook. We concur. As was noted by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), "common experience suggests that few households retain an employee whose only duties are to cook[.]" *Id*. at 5.[2] In the instant case, while

[2]In this case, common experience is confirmed by the composite description of "Private Household Workers" contained in the Bureau of Labor Statistic's ("BLA") Occupational Outlook Handbook (1998-1999 ed.) of which we take official notice. BLS notes that "[m]ost household workers are general houseworkers and usually the only worker employed in the home." *Id.* at 335. More specifically, BLS generated statistics to the effect that private

Employer has submitted significant documentation which could establish the need for a full-time cook, we find the lack of explanation regarding who performs the other household duties determinative in this matter. Employer has documented with specificity their entertainment and houseguest schedules, which evidence numerous demands for meal preparation for persons other than family members on a regular basis. Nevertheless, while their social and business status requires a lot of entertaining, Employer provides no information whatsoever as to who cleans and maintains the home in order to do such entertaining. Both Dr. and Mrs. Zakaria work outside the home on a full-time basis. In addition, they have a teenage son who is a full-time student, and another college-age son who comes home frequently. Based upon the foregoing we conclude that the record as presented supports the CO's conclusion that the Alien is more likely employed as a General Houseworker with cooking duties.

Moreover, we conclude the CO properly denied labor certification in this case based upon his finding with respect to Employer's unduly restrictive live-in requirement as well. Pursuant to § 656.21(b)(2)(iii), in instances where a worker is required to live on the employer's premises, the requirement will be deemed unduly restrictive unless the employer adequately documents that it arises from a business necessity. To establish business necessity for a live-in requirement, the employer must demonstrate that the requirement is essential to perform, in a reasonable, manner, the job duties as described by the employer. *Marion Graham*, 1988-INA-102 (Mar. 14, 1990) (*en banc*). If the duties described can be performed reasonably without an employee living on the premises, business necessity is not established. *See, e.g., David Sutton*, 1990-INA-470 (Oct. 25, 1991).

The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. Unduly restrictive requirements are prohibited as they have a chilling effect on the number of U.S. workers who may apply for the job opportunity. In the instant case, Employer requires that a prospective employee live on the premises solely due to the fact that they are not located close to public transportation. While Employer may consider this an accommodation or convenience to prospective employees, as a requirement it creates a chilling effect on U.S. applicants. As was noted by the CO, there are many alternatives to public transportation that do not involve living on the employer's premises. Thus, there is no business necessity, and the application was properly denied. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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household workers held about 802,000 jobs in 1996, the majority of which were general workers, and that less than 3 percent held a specialized position within the home. *Id.* at 336.

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.